IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARNABY ASHFORD BLOOMER, Appellant, vs. NITED STATES OF AMERICA, Appellee.	NO. 22585

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes	Page
Title 18, United States Code, Section 3231	1
Title 19, United States Code, Sections 482, 1582	19, 20
Title 21, United States Code, Section 176a	1, 15
Title 28, United States Code, Sections 1291, 1294	1

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in Count Four of a four-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in all four counts of a four-count indictment.

Count One alleged that appellant conspired with the other three defendants, Ayala, Gorrell, and McMullen, to smuggle marihuana into the United States.

Count Two alleged that defendant Ayala smuggled in 225 pounds of marihuana and the appellant and the two other defendants knowingly aided and abetted therein.

Count Three alleged that defendant Ayala knowingly transported and facilitated the transportation and concealment of 225 pounds of contraband marihuana and appellant and the two other defendants aided and abetted therein.

Count Four alleged that appellant knowingly received, concealed and facilitated the transportation and concealment of 225 pounds of contraband marihuana, aided and abetted by the other three defendants.

Defendant McMullen was a fugitive and defendant Gorrell had been found insane by the trial Court, and consequently neither of those two defendants went to trial [R.T. 78-79].[1] The case against the other defendant, Mr. Ayala, was dismissed by the trial Court because the government refused to reveal the informant [R.T. 271].

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[1] "R.T." refers to the Reporter's Transcript of Proceedings.

Counts One, Two, and Three against the appellant were dismissed by the trial Court [R.T. 226-227, 233, 279], and appellant was found guilty by the jury as charged in Count Four on August 25, 1967 [R.T. 317-318]. Thereafter, on October 20, 1967, appellant was committed to the custody of the Attorney General for a period of five (5) years on Count Four [C.T. 41].[2]

III

ERROR SPECIFIED

Appellant specified the following points upon appeal:

"I. Defendant's conviction must be reversed as the jury commissioner failed in his affirmative, constitutional duty to ensure that the jury panel fairly represented a cross-section of the community from which it was selected.

"II. The failure of the prosecution to reveal the identity of the alleged informer requires the reversal of defendant's conviction.

"III. There being no showing of knowledge of the presence of the narcotics, the defendant's conviction must be reversed.

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[2] "C.T." refers to Clerk's Transcript on Appeal.

"IV. United States Custom Agents' practice of conducting "border searches" is violation of the Fourth and Sixth Amendments of the Constitution of the United States; and requires reversal in this case."

IV

STATEMENT OF THE FACTS

On January 6, 1967, defendant Ayala entered the United States from Mexico at San Ysidro, California, driving a 1958 Oldsmobile [R.T. 80-82]. His wife and four children were with him and he said they were just going to wash, so all they had was laundry in the car [R.T. 82].

On cross-examination, the primary inspector, Mr. Yates, testified that he had not been alerted that this car might contain contraband [R.T. 84-85].

Customs Agent Gates testified that he observed Ayala in Inspector Yates' traffic lane, noticed the car bore California plates YWR-583, the vehicle he was waiting for, and kept it under surveillance [R.T. 87-88]. Ayala parked the vehicle in front of the San Ysidro Post Office and he, his wife, and four children alighted with some laundry and walked back toward the border to a laundromat [R.T. 89]. The car was kept under surveillance and no one put anything in the car [R.T. 90-92]. Ayala was questioned at the laundromat by Agent Gates [R.T. 94-97], and when asked who the car belonged to stated that the day before he had gone to Los

Angeles with an "Oscar Lopez" who deals in used cars in Tijuana. Lopez had purchased the car, and Ayala was keeping the car until it could be legally exported the following day [R.T. 97]. Ayala told Gates he had parked up by the Post Office because he had battery trouble and a friend, whom he declined to identify, lived nearby and could help him start the car if he had trouble [R.T. 95-96]. He also told Gates the keys were in the ignition [R.T. 96].

On cross-examination Agent Gates testified he was waiting for this particular vehicle because of a telephone call; that he believed it was a local call; that it was not from another agent; that it was not from Mexico; that the caller was a Mexican, not a government employee on a salary; that he identified himself and Gates knew his voice [R.T. 99-100]. The Government claimed the privilege not to reveal the identity of the informant [R.T. 99].

Appellant Bloomer's trial counsel, Mr. Clarke, then questioned Agent Gates on voir dire with respect to the informant out of the presence of the jury, and Agent Gates testified that he received the telephone call about twelve noon at his office in San Ysidro, and was informed a vehicle would be passing the border sometime after 4:00 p.m., and would probably be parked somewhere in the San Ysidro area and would have marihuana therein [R.T. 114]. Agent Gates further testified he had obtained information from this individual about twelve times before and the information

generally proved accurate; that the caller spoke English but was a Mexican citizen. The informant gave the license number of a 1955 blue Oldsmobile, but gave no information as to who might be driving the car [R.T. 116].

Customs Agent Aros testified he participated in the surveillance of the Oldsmobile and parked a short distance from the Oldsmobile in the area of the Post Office [R.T. 134]. He observed a red Jaguar containing two individuals come toward him on San Ysidro Boulevard, make a right turn and go past the Oldsmobile and out of sight [R.T. 135]. Five or ten minutes later Agent Aros was down at the laundry with Agent Gates on San Ysidro Boulevard and he observed the red Jaguar pass going in the opposite direction with a lone occupant; he followed the Jaguar [R.T. 135-136].

Agent Aros also testified that he questioned defendant Ayala and Ayala told him a "Juan Lopez" paid him $20.00 to drive the car over and park it in front of the Post Office at San Ysidro [R.T. 142-143].

Customs Agent Jackson testified he also had the Oldsmobile under surveillance near the Post Office and observed a red Jaguar proceeding southward on San Ysidro Boulevard toward the border with two people in it [R.T. 149-150]. Then perhaps a minute later, he noted a tall slender individual walking northward on San Ysidro, rounded the corner at West Olive, approached the Oldsmobile and got in it, turned the lights on, and he believed turned the motor

on [R.T. 151].

The officers then approached the Oldsmobile and the occupant identified himself as Barnaby A. Bloomer, the appellant. Appellant stated the car belonged to a friend, "John Cambro", and he was going to drive the car back to Los Angeles for Mr. Cambro and declined to answer where Mr. Cambro was [R.T. 152-153]. The officers then discovered the presence of marihuana bricks in the door panels and placed appellant under arrest [R.T. 153-154]. Agent Jackson found the registration on the Oldsmobile which indicated the car belonged to a John Cambro [Government Exhibit No. 2, R.T. 154].

Later Jackson saw the red Jaguar where Agent Aros had stopped it on 27th Street; the driver was David Gorrell. He searched the Jaguar and found a note pad (Government Exhibit No. 3), several small screwdrivers, a walkie-talkie radio, a pair of binoculars, small alligator clips and wire [R.T. 156]. The red Jaguar was registered to David Gorrell [R.T. 158]. The Oldsmobile was loaded in such a manner that it would necessitate use of both a Phillips and normal screwdriver and both kinds were in the Jaguar [R.T. 158-159]. There were notations on both the note pad (Government's Exhibit No. 3) and the envelope (Government's Exhibit No. 6) which were found in the Jaguar [R.T. 159-160, 195-196], said notations including reference to a Phillips screwdriver, wrench for "pannels," grass, Ks, various numbers, etc. (See

Exhibits No. 3 and 6).

Agent Jackson testified that marihuana was referred to as grass, hay, pot, china, weed, and the packages as kilos, bricks, kees, k's [R.T. 183-186].

Appellant's statements regarding Cambro were stricken and the jury admonished to disregard them [R.T. 187-194].

Agent Jackson also testified that the value of marihuana in Mexico at the time of the offense was $30.00 to $50.00 per kilo, probably in this load $35.00 a kilo. There were 100 kilos in this load with a value in the Los Angeles area of about $150.00 a kilo [R.T. 197-198].

Customs Investigator Hanson testified he drove the Oldsmobile back to the Port of Entry, searched it, and found the marihuana [R.T. 198-201]. Customs Investigator Meiger testified that he checked the address 401 Sepulveda Boulevard, Los Angeles (on Government's Exhibit No. 2) and found there was no such address and could not locate any subject by the name of John Cambro in the vicinity or the area. He also talked to the salesman and contract manager at Buster's Car Lot [R.T. 207-209].

Customs Investigator Gerhart testified he could not locate an Oscar Lopez dealing in used cars in Tijuana [R.T. 210].

The chain of custody and testimony of the chemist that the contraband was marihuana was stipulated to by

appellant [R.T. 216-217]. Government's Exhibits Nos. 1, 2, 3, 4, 5, and 6 were received in evidence [R.T. 225].

V

ARGUMENT

A. THE JURY COMMISSIONER PROPERLY PERFORMED HIS DUTY TO INSURE THAT THE JURY PANEL FAIRLY REPRESENTED A CROSS-SECTION OF THE COMMUNITY.

From the transcript it is clear that the jury commissioner's main source of selection was a matter of mere chance. He took a majority of the names by selection of the bottom name of every fourth column in the telephone directory [R.T. 38]. Such a selection certainly doesn't admit of discrimination nor limitation except perhaps with respect to those households without telephones which in this day and age is minimal. Certainly this method of selection meets Justice Frankfurter's test in Cassell v. Texas, 339 U.S. 282, at 291 (1949) as to "the uncontrolled caprices of chance" being one valid method of selection.

The jury commissioner also made himself aware of the significant identifiable elements in the community [R.T. 29, 34]. He followed a "more or less systemized procedure for contacting responsible members or organizations within the class to obtain names . . . . of those likely to be available and qualified" as recommended in Brooks v. Beto,

366 F.2d 1, at 23, 5th Cir. (1966), cert. denied, 386 U.S. 975, reh. denied, 386 U.S. 1043 [R.T. 29-30, 34]. In fact, the jury commissioner contacted responsible members and organizations within the classes mentioned in the transcript [R.T. 29, 40].

That the jury commissioner was aware of "significant identifiable elements" in this community is evidenced by the references to the following: "the Japanese telephone directory;" . . . "a list . . . of the local Filipinos;" . . . "some 300 names from the NAACP;" . . . "a list of the Jewish Association." Not only was he aware of such organizations but, contrary to appellant's suggestion that 60 percent of the jury rolls were made up of names chosen from associations such as the Rotary Club, the Fine Arts Society, and the Zwack Rowing Club (Appellant's Brief, p. 7), the jury commissioner testified that only "6 or 7 percent" of the names on the jury roll were taken from the various social clubs mentioned above [R.T. 38].

The defendants have the burden of proof to show that the system of jury selection is illegal (Swain v. Alabama, 380 U.S. 202, 1965), and in the case at bar there is no statistical information whatsoever with which to compare the composition of the jury panel and the population.

Furthermore, it cannot be asserted that discrimination was practiced with respect to the economic structure of the community. There is absolutely no showing that the

commissioner discriminated against lower economic groups or sought a constitutionally impermissable "blue ribbon" jury.

In fact, as Judge Copple states, "you can't avoid the fact that the result is certainly some test of the system." [R.T. 42] He further stated, "I would certainly want the record to show that during the five or six jury trials that "I've had here in the last two weeks, that there has certainly been a good cross-section both by color and race, by sex, by age, by apparent income bracket and occupation, represented on the jury panels." [R.T. 42].

Thus, tested by the legal principles involved, the testimony, or the results, we can come to no conclusion but that the jury commissioner's selection process was "reasonably designed to produce a representative cross-section of the community in the light of practical means available" (United States v. Greenberg, 200 F. Supp. 382, 389, S.D.N.Y. 1961) and that the jury commissioner properly performed his duty.

B. THE GOVERNMENT WAS NOT OBLIGATED TO REVEAL THE IDENTITY OF THE INFORMER AND FAILURE TO DO SO DOES NOT WARRANT A REVERSAL.

The appellant bases his case for disclosure of the informant on the Sixth Amendment right to confront witnesses against him (Appellant's Brief, p. 9); however, this right is "to secure the accused in the right to be tried by only

uch witnesses as meet him face to face . . ."

Curtis v. Rives, 123 F. 2d 936, 938
(C.A.D.C. 1941)

t does not apply to an informant who is absent from the
rial.

Dear Check Quong v. United States,
160 F.2d 251, 253 (C.A.D.C. 1947)

From a reading of the transcript it is obvious that he only possible "testimony" of the informant that could ave been used against the appellant by the jury was Agent ates' testimony that he was waiting for this particular car ecause of a telephone call from a Mexican [R.T. 99-100].

No hearsay statements ("testimony") of the inform-nt were used; so it is difficult to understand how appellant as deprived of his right to confront witnesses against him.

As was stated in the Curtis case cited supra, What the appellant really charges is not denial of the right f confrontation as such, but suppression or concealment of vidence or witnesses favorable to him" (See Appellant's rief, p. 9, lines 4-21). Since such a suppression or con-ealment might be violative of appellant's Fifth Amendment ue process rights, let us examine the record in that regard.

Appellant seems to rely basically upon Roviaro v. nited States, 353 U.S. 53 (1957); yet in that case there as evidence the informant "had taken a material part in ringing about possession of certain drugs by the accused,

had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged." (Rovario, supra, at p. 55)

Nothing even remotely similar to the facts quoted above in Rovario are indicated in our record. The informant was not present when appellant got in the Oldsmobile; appellant was the "lone occupant" [R.T. 152]. Nor is there any showing anywhere that the informant took a material part in bringing about appellant's possession or might be a material witness as to whether the accused knowingly received the marihuana as charged.

As has been stated by this Circuit, "In Roviaro, supra, the informant was a participant in the crime. That the informant was such here is mere hopeful guessing on appellant's part."

Hurst v. United States, 344 F.2d 327,
328 (9th Cir. 1965)

In Roviaro the court also noted that the informant "was the sole participant, other than the accused, in the transaction charged" (at p. 64); and consequently it was apparent his testimony may have been "relevant and helpful to the defense." But such is not the case here. In the instant case defendant Ayala drove the car across the line and was present and testified, and defendant Gorrell was apprehended near the scene. There is no evidence or even

int of the informant's presence except possibly at the time he car was loaded in Mexico [R.T. 263-272]. And in that egard, it is to be noted that appellant was only tried on he charge of receiving the marihuana in the United States, ot with having smuggled it in from Mexico; all other were ismissed by the trial Court.

C. THE EVIDENCE OF KNOWLEDGE OF THE PRESENCE OF THE MARIHUANA WAS SUFFICIENT AND APPELLANT'S CONVICTION SHOULD BE SUSTAINED.

This Court has stated in Evans v. United States, 57 F.2d 121 (9th Cir. 1958) at p. 128:

> "Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof."

In the case at bar, appellant approached the load ehicle, got in it, turned the lights on, and possibly turned he motor on [R.T. 151]. He was the lone occupant at the ime [R.T. 152]. Thus there is no question but that appelant had exclusive control and dominion over the vehicle and as exercising that dominion and control. The contraband as discovered in the vehicle momentarily thereafter [R.T. 53-154]. Thus, under the Evans test (supra) there are

potent circumstances tending to prove knowledge in this case.

Furthermore, the very statute under which appellant was charged, Title 21, United States Code, Section 176a, tends to indicate the sufficiency of the evidence in this case. That section provides in part as follows:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Under the Evans doctrine (supra) the trier of fact could certainly infer knowledgeable possession and if they did, under this section there was sufficient evidence to convict, particularly where, as here, the defendant gives no explanation whatsoever of his possession.

Appellant relies solely on Davis v. United States, 382 F.2d 221 (9th Cir. 1967) for his contention there was no showing of knowledge. Yet the Davis case is completely different than the case at bar. In Davis, the contraband was found later in a Sheriff's vehicle while here it was found immediately in the vehicle over which appellant was exercising sole and exclusive control. Davis was not found in possession of the contraband; here the appellant was. In Davis there not only had to be an inference of knowledge

but also of possession -- an inference upon an inference. Davis never had exclusive dominion and control of the car in which the contraband was found, but appellant here did.

And of course in this case we have other circumstances than just possession tending to indicate knowledge. We have the circumstances indicating appellant got out of the red Jaguar in which were found both Phillips and plain type screwdrivers. These were necessary to unload the marijuana from the panels where it was hidden [R.T. 158-159]. There was also a note pad and envelope in the Jaguar with notations as to a Phillips screwdriver and wrench for "pannels", 225 grass, K's, etc. [R.T. 156 and Government's Exhibits 3 and 6].

There is also the evidence showing the high value of the contraband [R.T. 197-198], which, of course, diminishes the likelihood of some innocent party having dominion and control thereof.

For all these reasons it seems clear there was sufficient evidence of knowledge and to convict, and certainly such is the case if the evidence is considered in the light most favorable to the government as is the rule on appeal.

D. THE SEARCH IN THIS CASE WAS LEGAL AND NOT VIOLATIVE OF THE FOURTH AND SIXTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

Appellant in his Argument IV seems to be rehashing the "revealing of informant" issue rather than the legality of the search. However, be that as it may, let's examine the legality of the search.

The record indicates that Agent Gates received a telephone call about twelve noon and was informed by a reliable informant, who gave thelicense number of a 1955 blue Oldsmobile, that the vehicle would be passing the border sometime after 4:00 p.m., and would probably be parked somewhere in the San Ysidro area and would have marihuana therein. He gave no information as to who might be driving the car [R.T. 114-116]. Agent Gates saw the vehicle come through the line and kept it under surveillance [R.T. 87-88]. It was parked in front of the San Ysidro Post Office, kept under surveillance, and no one put anything in the car [R.T. 89-92]. Later the appellant approached the Oldsmobile, got in and turned the lights on [R.T. 151]. The officers then approached the vehicle, searched it, discovered the marihuana and then placed the appellant under arrest [R.T. 153-154].

Even disregarding any question of so-called "Border Search," it is obvious just from a recitation of the facts that there was probable cause for the search of the automobile.

It was long ago held in Carroll v. United States, 267 U.S. 132 (1925), that law enforcement officers have the power to stop and search a vehicle if they have probable cause to believe that the vehicle is being used to transport contraband. And in Brinegar v. United States, 338 U.S. 160 (1949) the Supreme Court held that what the officer knew from outside reliable informants or from his own prior experience could be taken into account in deciding whether there was probable cause for the stopping and the search.

Certainly a reliable informant was involved here. Agent Gates testified he had obtained information from this individual about 12 times before and the information generally proved accurate [R.T. 115]. Furthermore, the facts later developed in this particular case, i.e., license number, make of car, place parked, and contraband proved to check with the informant's information relayed to Agent Gates and tended to show his reliability.

Also, it is a known fact, of which this Court can probably take judicial notice from its own experience, that the Tijuana, Mexico, San Ysidro, California, area is one of the most prevalent areas for smuggling in the world. Agent Jackson, who made the arrest, has been employed by Customs since 1951 and had been working marihuana cases since 1963 [R.T. 197], and certainly his and the other officers' prior experience,as well as Gates' prior experience with the informant should be taken into account pursuant to Brinegar

(supra) in deciding probable cause.

Assuming, arguendo, that probable cause for arrest or search was lacking, the search of the vehicle was a valid border search. As has been said by this Court previously, a search for contraband by Customs Officers away from the border "must be tested by a determination whether the totality of the surrounding circumstances . . . are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on a vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs Officials which meets this test is properly called a 'border search'."

Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966)

Since the vehicle here was constantly under surveillance by Customs Officers from the time it crossed the border until the moment that it was searched [R.T. 87-93, 149-151], the facts of this case clearly satisfy the test in Alexander.

As far as the statutory basis for such searches are concerned, the sections pertinent are Title 19, United States Code, Sections 482 and 1582. Section 482 reads as follows in pertinent part:

"Any of the officers . . . may stop, search, and examine . . . any vehicle,

beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States contrary to law." (19 U.S.C. 482, emphasis added.)

Section 1581 empowers the Secretary of the Treasury to promulgate regulations affecting searches of persons and baggage and the following regulation has been promulgated:

"(a) A Customs officer may stop any vehicle arriving in the United States from a foreign country for the purpose of examining the manifest or inspecting or searching the vehicle and may stop, search, and examine any vehicle or person within the limits of the United States on which or on whom he may have reasonable cause to believe there is merchandise subject to duty or which has been introduced into the United States contrary to law." (19 C.F.R., Sec. 23.1).

The constitutionality of Customs searches under these provisions have been sustained. Murgia v. United States, 283 F.2d 14 (9th Cir. 1960). The Court there held that there is no requirement of probable cause before

Customs agents can initiate a stopping and search.

Thus, it can be seen that whether we consider this search from the viewpoint of "probable cause" or "border search", it was legal and not violative of the defendant's constitutional rights.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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